U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 16 November 2005

Case No.: 2004-BLA-6086

In the Matter of:

DANNY CAUSEY
Claimant

v.

BLEDSOE COAL COMPANY
Employer

JAMES RIVER COAL COMPANY
Carrier

and

DIRECTOR,OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest

APPEARANCES

Edmond Collett, Esquire
For the Claimant

Lois A. Kitts, Esquire
For the Employer

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER – DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the "Act"). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

Mr. Danny A. Causey, represented by counsel, appeared and testified at the formal hearing held August 30, 2005 in Hazard, Kentucky. I afforded both parties the opportunity to offer testimony, question witnesses and introduce evidence. Thereafter, I closed the record. I

based the following Findings of Fact and Conclusions of Law upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. Although the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformity with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, EX and CX refer to the exhibits of the Director, Employer and Claimant, respectively.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Procedural History

Claimant, Danny A. Causey, filed the instant claim for benefits on September 6, 2002. (DX 2). The District Director denied Claimant benefits on December 24, 2003. (DX 26). Claimant subsequently filed notice contesting the Director's finding and requesting a formal hearing on January 5, 2004. (DX 27). Then on April 2, 2004, the claim was transferred to the Office of Administrative Law Judges. (DX 31).

Factual Background

Claimant was born on April 29, 1959, weighs 245 pounds and is seventy inches tall. (DX 2, Tr. 11). He is married to Irma Causey. (DX 7; Tr. 12). The couple has three adult children. (DX 2; Tr. 12). Claimant finished high school and vocational school, where he studied welding. (Tr. 13). He worked the majority of his career in the coal fields. He operated a Wilcox section, pinner and bolt machine, and worked as an underground roof bolter. (Tr. 15-7). Claimant worked in coal mine employment from 1980 until 2001. (Tr. 15-7).

Claimant testified he suffers from shortness of breath upon exertion and has trouble sleeping. (DX 2; Tr. 19-20). He uses an inhaler for his breathing troubles. (Tr. 21). Claimant stated he smoked about a pack of cigarettes a month his senior year in high school. (Tr. 13). I find Claimant smoked a pack of cigarettes a month for eight months between 1976 and 1977.

Dependency

The Claimant alleges three dependents for the purposes of benefit augmentation, namely his wife, Irma and children Miranda, Rene and Daniel. (DX 2). Claimant and his wife married on December 31, 1979. (DX 7). Miranda was born December 22, 1980, Rene October 25, 1982 and Daniel July 1, 1984. (DX 8-10). Claimant testified that when he filed his claim Miranda and Rene were attending college and Daniel was a senior in high school. (DX 12, 15). There is no evidence in the record to substantiate that Miranda and Rene were full-time students at the time. Accordingly, I find Claimant's wife is a dependent for the purposes of benefit augmentation and his son Daniel was a dependent until he graduated from high school in 2003.

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. Claimant's length of coal mine employment is a non-contested issue. The District Director made a finding of twenty-two years in coal mine employ-ment. (DX 26). Claimant testified to working in coal mine employment between 1980 and April 10, 2001. (Tr. 14, 19). The documentary evidence includes Claimant's Social Security earnings report and an employment questionnaire. (DX 4-5). Accordingly, based upon all the evidence in the record, I find that Claimant was a coal miner, as that term is defined by the Act and Regula-ions, for twenty-two years. He last worked in the Nation's coal mines in 2001. (DX 2, 4; Tr. 19).

Contested Issues

The parties contest the following issues regarding this claim:

1. Whether Claimant has pneumoconiosis as defined by the Act and the regulations;

2. Whether Claimant's pneumoconiosis, if present, arose out of coal mine employment;

3. Whether Claimant is totally disabled; and

4. Whether Claimant's total disability, if present, is due to pneumoconiosis.

The employer also contests other issues that are identified at line 18(b) on the list of issues. (DX 31). These issues are beyond the authority of an administrative law judge and are preserved for appeal.[1]

Medical Evidence

Medical evidence submitted with a claim for benefits under the Act is subject to the requirement that it must be in "substantial compliance" with the applicable regulations' criteria for the development of medical evidence. *See* 20 C.F.R. §§ 718.101 to 718.107. The regulations address the criteria for chest x-rays, pulmonary function tests, physician reports, arterial blood gas studies, autopsies, biopsies and "other medical evidence." *Id.* "Substantial compliance" with the applicable regulations entitles medical evidence to probative weight as valid evidence.

Secondly, medical evidence must comply with the limitations placed upon the develop-ment of medical evidence. 20 C.F.R. § 725.414. The regulations provide that a party is limited to submitting no more than two chest x-rays, two pulmonary function tests, two arterial blood gas studies, one autopsy report, one biopsy report of each biopsy and two medical reports as affirmative proof of their entitlement to benefits under the Act. §§ 725.414(a)(2)(i), 725.414 (a)(3)(i). Any chest x-ray interpretations, pulmonary function test results, arterial blood gas

[1] These issues involve the constitutionality of the Act and the regulations. Administrative Law Judges are precluded from ruling on the constitutionality of the Act; therefore, these issues will not be ruled on herein but are preserved for appeal purposes.

study results, autopsy reports, biopsy reports and physician opinions that appear in one single medical report must comply individually with the evidentiary limitations. *Id.* In rebuttal to evidence propounded by an opposing party, a claimant may introduce no more than one physician's interpretation of each chest x-ray, pulmonary function test or arterial blood gas study. §§ 725.414(a)(2)(ii), 725.414(a)(3)(ii). Likewise, the District Director is subject to identical limitations on affirmative and rebuttal evidence. § 725.414(a)(3)(i-iii).

A. X-ray Reports[2]

Exhibit	Date of X-ray	Physician/Qualifications	Interpretation
DX 10	11/14/02	Simpao	1/2
DX 13	11/14/02	Barrett B-reader	Quality reading
EX 7	11/14/02	Poulos BCR/B-reader	Negative
EX 3	4/30/03	Rosenberg B-reader	Negative
EX 1	3/10/04	Repsher B-reader	No pneumoconiosis

B. Pulmonary Function Studies[3]

Exhibit/ Date of exam	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1 / FVC	Tracings	Comments
DX 12[4] 11/14/02	Simpao	43/ 69"	4.43	5.75	148	77	Yes	Good effort and understanding
EX 3 4/30/03	Rosenberg	44/ 70"	4.37	5.34	137	83	Yes	Good effort
EX 1 3/10/04	Repsher	44/ 71"	4.22	5.00	173	84	Yes	Good effort

[2] A chest x-ray may indicate the presence or absence of pneumoconiosis. 20 C.F.R. § 718.102(a) and (b). It is not utilized to determine whether the miner is totally disabled, unless complicated pneumoconiosis is indicated wherein the miner may be presumed to be totally disabled due to the disease.

[3] The pulmonary function study, also referred to as a ventilatory study or spirometry, indicates the presence or absence of a respiratory or pulmonary impairment. 20 C.F.R. § 718.104(c). The regulations require that this study be conducted three times to assess whether the miner exerted optimal effort among trials, but the Benefits Review Board (the "Board") has held that a ventilatory study which is accompanied by only two tracings is in substantial compliance with the quality standards at § 718.204(c)(1). *Defore v. Alabama By-Products Corp.*, 12 B.L.R. 1-27 (1988). The values from the FEV_1 as well as the MVV or FVC must be in the record, and the highest values from the trials are used to determine the level of the miner's disability.

[4] Employer provided a rebuttal opinion by Dr. Fino, who found Claimant's spirometry normal based on the November 14, 2002 pulmonary function test. (EX 5).

C. Blood Gas Studies[5]

Exhibit	Date of Exam	Physician	pCO_2	pO_2	Resting/ Exercise
DX 12	11/14/02	Simpao	50.7	62.5	R[6]
DX 12	9/11/03	Baker	45	67	R[7]
EX 3	4/30/03	Rosenberg	49.6	64.7	R[8]
EX 1	3/10/04	Repsher	47	81	R[9]

D. Narrative Medical Evidence

Valentino Simpao, M.D., Board-certified in Internal Medicine and Pulmonary Diseases, examined Claimant on November 14, 2002, at which time he took a patient history of symptoms and recorded an employment history of twenty-one years as an underground miner. (DX 10). Dr. Simpao noted Claimant had a history of frequent colds, wheezing attacks (ten years), arthritis (ten years), heart disease, allergies and high blood pressure (ten years). He recorded a smoking history of one pack of cigarettes a week between 1974 and 1976. Claimant's symptoms included sputum (daily), wheezing with exertion (ten years), dyspnea (daily upon exertion, ten years), productive cough (ten years), chest pain (twice weekly, midsternal), ankle edema (five years), paroxysma nocturnal dyspnea (ten to twelve times nightly with shortness of breath) and shortness of breath when walking over seventy-five feet. In addition, Dr. Simpao performed a chest x-ray, pulmonary function tests and arterial blood gas studies. Dr. Simpao also performed a physical examination of Claimant. Upon palpation, Dr. Simpao found tactile fremitus, increased right over left. At percussion he found increased resonance in the upper chest and axillary areas. Then upon auscultation he found crepitations with occasional forced expiratory wheezes. (DX 10).

After reviewing the results of the examination and tests, Dr. Simpao diagnosed Claimant with coal workers' pneumoconiosis 1/2. Dr. Simpao based his opinion on Claimant's coal dust exposure, chest x-ray, arterial blood gas studies, symptomatology and his physical findings. In Dr. Simpao's opinion, Claimant has a moderate impairment rating due to pneumoconiosis and does not have the capacity to return to coal mine employment or comparable employment in a dust free environment. (DX 10).

[5] Blood-gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. 20 C.F.R. § 718.105(a).
[6] Employer provided a rebuttal opinion by Dr. Fino. He found the study showed mild hypoxemia and mild hypercarbia. He stated that the test was invalid. Although I have taken Dr. Fino's opinion into consideration it does not invalidate the study. Dr. Simpao, a Board-certified in Internal Medicine and Pulmonary Diseases, provided a supplemental opinion maintaining the study abnormal and valid.
[7] Employer provided a rebuttal opinion by Dr. Fino on the September 11, 2003 arterial blood gas study. Dr. Fino found the study valid.
[8] Dr. Rosenberg's arterial blood gas study fails to indicate the altitude level the test was administered. Therefore, the test does not meet regulation requirements and I will give it no weight. *See* 20 C.F.R. § 718.105(c)(2).
[9] Dr. Repsher's arterial blood gas study fails to indicate the altitude level the test was administered. Therefore, the test does not meet regulation requirements and I will give it no weight. *See* 20 C.F.R. § 718.105(c)(2).

Dr. Simpao submitted a supplemental medical report on July 15, 2005. (DX 34). Dr. Simpao maintains that the arterial blood gas studies he performed are valid and abnormal. He states he repeated the tests many times with little change in the results. Dr. Simpao acknowledges that Claimant may need to investigate with his family physician regarding the causes of the abnormality but opines Claimant's weight may be a factor. He further diagnoses Claimant with pneumoconiosis based on an abnormal chest x-ray, symptomatology and physical findings. (DX 34).

David M. Rosenberg, M.D., Board-certified in Internal Medicine and Pulmonary Diseases, examined Claimant on April 30, 2003 and issued a medical report on Claimant's condition on May 31, 2003. (EX 3). Dr. Rosenberg reviewed Claimant's symptoms and recorded an employment history in the underground coal mines for twenty-one years. He found that Claimant was a non-smoker. Dr. Rosenberg recorded Claimant had a history of chronic back pain, fractured ribs and had previously suffered a myocardial infarction six years ago and underwent a catheterization. At the time of the evaluation, Claimant complained of a smothering sensation, shortness of breath when walking and going up stairs, other breathing problems (10 years) and a history of swelling with occasional episodes of hemoptysis in the past. Claimant was taking Singular and used inhalers in the form of Combivent. Upon physical examination, Dr. Rosenberg found Claimant had equal expansion of his chest without rales, rhonchi or wheezing. Claimant had no murmurs, gallops or rubs, his abdomen was protuberant and had 1+ edema. Dr. Rosenberg performed a chest x-ray, pulmonary function tests and arterial blood gas studies on Claimant. (EX 3).

Dr. Rosenberg opined Claimant's total lung capacity is normal and that Claimant has no restrictions. He noted Claimant's diffusing capacity corrected for lung volumes was normal indicating the alveolar capillary bed within his lungs is intact. Dr. Rosenberg stated Claimant's chest x-ray revealed no evidence of micronodularity associated with coal dust exposure. He opined Claimant does not have pneumoconiosis. Furthermore, Dr. Rosenberg noted Claimant has no restrictions and although the arterial blood gas study results meet DOL disability requirements, from a functional perspective Claimant can perform his previous coal mine employment or other similar types of labor. Dr. Rosenberg stated Claimant's hypoventilation is explained by his pain medications and conceivably his sleep apnea. (EX 3).

Dr. Rosenberg's provided a supplemental report on September 19, 2005. (EX 12). Dr. Rosenberg reviewed Dr. Simpao's supplemental report and the other evidence in the record. He noted despite Dr. Simpao's report his opinion remains the same. He stated Claimant's blood gas studies indicate Claimant does not have a disabling gas exchange abnormality. Dr. Rosenberg opined that Claimant's increase in body mass index and not coal dust exposure, is contributing significantly to his CO_2 elevation (hypoventilation) and corresponding drop in PO_2.[10] He further stated Claimant does not have pneumoconiosis. (EX 12).

[10] Dr. Rosenberg also discusses the findings from his arterial blood gas study; however, as stated above, it did not conform to regulation requirements and will not be given weight.

In addition, the record includes a deposition of Dr. Rosenberg taken on December 12, 2003. (EX 4). Dr. Rosenberg reiterated the findings in his report and further testified that he opined Claimant does not suffer from pneumoconiosis or a chronic obstructive lung disease. Dr. Rosenberg attributes Claimant's respiratory condition to his weight and the pain medications he is taking. Dr. Rosenberg also testified Claimant retains the capacity to return to his ordinary coal mine employment. (EX 4).

Lawrence Repsher, M.D., Board-certified in Internal Medicine and Pulmonary Diseases, examined Claimant on March 10, 2004, at which time he reviewed the Claimant's symptoms and recorded an occupational history in the underground coal mines from 1980 through 2001. (EX 1). He noted Claimant last worked as a bridge operator. Dr. Repsher stated Claimant's smoking history revealed six to twelve months of smoking as a teenager. Dr. Repsher found Claimant had a history of acute MI (1997), inferior myocardial infarction, hypertension, symptomatic GERD, back problems, rib fractures and arthroscopy of the right knee. He noted Claimant complained of smothering at night, dry cough, infrequent typical anginal pain, two or three pillow orthopnea for the past seven years and nightly PND and ankle edema. Upon physical examination, Dr. Repsher found Claimant was obese. Dr. Repsher noted Claimant's breathing sounds were normal, expiratory phase was not prolonged and there were no rales, rhonchi or wheezes, even on forced expiration present. He found no clubbing or phlebitis but Claimant has 1+ pitting edema in the right lower extremity to the mid-calf. Dr. Repsher performed a chest x-ray, pulmonary function tests, arterial blood gas studies and reviewed the other medical evidence in the record. He noted the chest x-ray revealed no pneumoconiosis; pulmonary function test was normal, including normal diffusing capacity; and, arterial blood gas results were normal.[11] (EX 1).

Dr. Repsher diagnosed Claimant with hypertension, GERD, osteoarthritis, chronic back pain, coronary artery disease complicated by angina pectoris and chronic left ventricular congestive heart failure. In his opinion, Claimant does not suffer from pneumoconiosis or any other dust related respiratory disease. He noted Claimant suffers from no chronic obstructive pulmonary disease or respiratory impairment. Dr. Repsher based his opinion on Claimant's negative chest x-ray and normal pulmonary function tests and arterial blood gas studies. (EX 1).

Dr. Repsher provided a supplemental report on September 20, 2005. (EX 12). Dr. Repsher reviewed Dr. Simpao's supplemental report and the other evidence in the record. He noted Dr. Simpao's arterial blood gas studies are valid and abnormal. He based his opinion on the fact that the results were not significantly different from the results of Drs. Rosenberg and Baker. However, Dr. Repsher diagnosed Claimant with both chronic and acute CO_2 retention, consistent with obesity hypoventilation and an element of voluntary breath holding. Dr. Repsher stated pneumoconiosis, when clinically significant, results in a normal or low pCO_2, not a high pCO_2, as Claimant demonstrates consistently. Dr. Repsher's opinion of no pneumoconiosis remained. He further opined Claimant has normal arterial blood gases in the sense that his ability to oxygenate his blood is unequivocally normal. (EX 12).

[11] As noted above, Dr. Repsher's arterial blood gas study did not conform to regulation requirements, and therefore, will not be given weight.

In addition, the record includes a deposition of Dr. Repsher taken on July 8, 2004. (EX 2). Dr. Repsher reiterated the findings in his report and further testified that he opined Claimant does not suffer from pneumoconiosis and retains the capacity to return to his ordinary coal mine employment. Dr. Repsher testified that he believes Claimant is a tobacco smoker or at least uses smokeless tobacco. He stated Claimant's abnormal arterial blood gas studies of record are due to microateletasis from a combination of obesity and decreased respiratory drive and obesity is contributing to Claimant's hypoxemia. (EX 2).

E. Hospital Records and Treatment Notes

The amended regulations provide that, notwithstanding the evidentiary limitations contained at 20 C.F.R. § 725.414(a)(2) and (a)(3), "any record of a miners hospitalization for respiratory or pulmonary or related disease may be received into evidence." 20 C.F.R. § 725.414 (a)(4). Furthermore, a party may submit other medical evidence reported by a physician and not specifically addressed under the regulations under Section 718.107, such as a CT scan.

Claimant submitted hospital and treatment records between 2001 and 2002 from Mary Breckinridge Hospital. (DX 14). Claimant's treating physician was Roy Varghese, M.D. Throughout the records, Dr. Varghese notes Claimant suffers from black lung disease and chronic obstructive pulmonary disease. Dr. Varghese prescribed Singular and a Combivent inhaler for Claimant's condition. However, Dr. Varghese neither states the basis of his diagnosis nor provides documentation in support of his opinion. Dr. Varghese indicates Claimant worked in the coal mines for twenty years but that is the extent of his reasoning. Dr. Varghese never attributes Claimant's respiratory problems to his coal mine employment. Dr. Ashutosh K. Mishra also indicates Claimant suffers from chronic obstructive pulmonary disease but also does not indicate the basis of his opinion.

DISCUSSION AND APPLICABLE LAW

Because Claimant filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, Claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 20 C.F.R. § 725.202(d)(2)(i-iv). Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 B.L.R. 1-111, 1-112 (1989).

Pneumoconiosis and Causation

Section 718.202 provides four means by which pneumoconiosis may be established: chest x-ray, biopsy or autopsy, presumption under §§ 718.304, 718.305 or 718.306, or if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. 20 C.F.R. § 718.202(a). The regulatory provisions at 20 C.F.R. § 718.201 contain a definition of "pneumoconiosis" provided as follows:

> (a) For the purposes of the Act, "pneumoconiosis" means a chronic dust disease of the lung and its sequelae, including respiratory and

> pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or "clinical," pneumoconiosis and statutory, or "legal," pneumoconiosis.
>
> (1) Clinical Pneumoconiosis. "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) Legal Pneumoconiosis. "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

§ 718.201(a).

It is within the administrative law judge's discretion to determine whether a physician's conclusions regarding pneumoconiosis are adequately supported by documentation. *Lucostic v. United States Steel Corp*., 8 B.L.R. 1-46, 1-47 (1985). "An administrative law judge may properly consider objective data offered as documentation and credit those opinions that are adequately supported by such data over those that are not." *See King v. Consolidation Coal Co*., 8 B.L.R. 1-262, 1-265 (1985).

A. X-ray Evidence

Under section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(*en banc*); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). As noted above, I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP,* 12 B.L.R. 1-6 (1988); *Clark*, 12 B.L.R. 1-149 (1989).

The chest x-rays in the record do not support a finding of pneumoconiosis. Dr. Simpao found the November 14, 2002 x-ray film positive for pneumoconiosis; however, the x-ray was re-read as negative by Dr. Poulos, a Board-certified radiologist and B-reader. As such, I find this x-ray negative. Dr. Rosenberg, a B-reader, found the April 30, 2003 x-ray film negative and Dr. Repsher, a B-reader, found the March 10, 2004 x-ray film negative. Accordingly, I find the preponderance of negative x-ray readings outweigh the positive readings. Therefore, pneumoconiosis has not been established under § 781.202(a)(1).

B. Autopsy/Biopsy

Pursuant to Section 718.202(a)(2), a claimant may establish the existence of pneumoconiosis by biopsy or autopsy evidence. As no biopsy or autopsy evidence exists in the record, this section is inapplicable in this case.

C. Presumptions

Section 718.202(a)(3) provides that it shall be presumed that the miner is suffering from pneumoconiosis if the presumptions described in Sections 718.304, 718.305, or 718.306 are applicable. Section 718.304 is not applicable in this case because there is no evidence of complicated pneumoconiosis. Section 718.305 does not apply because it pertains only to claims that were filed before January 1, 1982. Finally, Section 718.306 is not relevant because it is only applicable to claims of miners who died on or before March 1, 1978.

D. Medical Opinions

Section 718.202(a)(4) provides another way for a claimant to prove that he has pneumoconiosis. Under section 718.202(a)(4), a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion might support the presence of the disease if it is supported by adequate rationale, not withstanding a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 B.L.R. 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 9 B.L.R. 1-22, 1-24 (1986). The weight given to a medical opinion will be in proportion to its well-documented and well-reasoned conclusions.

A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 B.L.R. 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 B.L.R. 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 B.L.R. 1-295 (1984); *Buffalo v. Director*, OWCP, 6 B.L.R. 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp*., 2 B.L.R. 1-130 (1979).

A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(*en banc*).

Dr. Simpao's report concluded Claimant suffers from pneumoconiosis. (DX 10). He bases his opinion on Claimant's multiple years of coal dust exposure, chest-ray and other physical findings and symptomatology. Dr. Simpao fails to explain how his other physical findings and Claimant's symptomatology provide a basis for a diagnosis of pneumoconiosis. Also Dr. Simpao's findings are not supported by the evidence in the record. Therefore, I find Dr. Simpao's report unreasoned and I give it little weight.

In contrast, Dr. Rosenberg's report concluded Claimant does not have pneumoconiosis. (EX 4). Dr. Rosenberg opined Claimant's lung capacity is normal. To support his opinion, Dr. Rosenberg notes upon examination Claimant's total lung capacity and volumes were normal, his lungs were normal on auscultation and his chest x-ray did not reveal micronodularity. Dr. Rosenberg's opinions are consistent with the probative chest x-ray evidence of record. He further explained his findings in his December 12, 2003 deposition. I find Dr. Rosenberg's medical report is well-reasoned and well-documented regarding pneumoconiosis.

Dr. Repsher also opined Claimant does not have pneumoconiosis. Dr. Repsher bases his opinion on his own findings upon physical examination and review of the medical evidence. Dr. Repsher reviewed the reports and findings of Drs. Baker, Simpao and Rosenberg in formulating his decision. He reviewed the medical record and took into consideration Claimant's treatment as well as the findings on examination and testing. Dr. Repsher based his opinions on a more complete consideration of Claimant's current status regarding his smoking history and results on pulmonary testing and chest x-rays. His opinions are consistent with the probative chest x-ray evidence of record. Dr. Repsher further explains his findings and reasoning in his July 8, 2004 deposition. (EX 5). I find Dr. Repsher's medical report is well-reasoned and well-documented regarding pneumoconiosis.

I have considered all the evidence under Section 718.202(a); and I find the probative negative x-ray reports and the more complete, comprehensive and better supported medical opinion reports of Drs. Rosenberg and Repsher outweigh the unreasoned report of Dr. Simpao and the other contrary evidence of record. Thus, I find Claimant has failed to demonstrate, by a preponderance of the evidence, the existence of pneumoconiosis.

Causation of Pneumoconiosis

Once it is determined that a claimant suffers from pneumoconiosis, it must be determined whether the claimant's pneumoconiosis arose, at least in part, out of coal mine employment. 20 C.F.R. § 718.203(a). The burden is upon Claimant to demonstrate by a preponderance of the evidence that his/her pneumoconiosis arose out of his coal mine employment.
20 C.F.R. § 718.203(b) provides:

> If a miner who is suffering or has suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arouse out of such employment.

Id.

Since I have found that Claimant failed to prove that he has pneumoconiosis, the issue of whether pneumoconiosis arose out of his employment in the coal mines is moot.

Total Disability

The determination of the existence of a totally disabling respiratory or pulmonary impairment shall be made under the provisions of Section 718.204. A miner is considered totally disabled when his pulmonary or respiratory condition prevents him from performing his usual

coal mine work or comparable work. 20 C.F.R. § 718.204(b)(1). Non-respiratory and non-pulmonary impairments have no bearing on a finding of total disability. *See Beatty v. Danri Corp.*, 16 B.L.R. 1-11, 1-15 (1991). A claimant can be considered totally disabled if the irrebuttable presumption of Section 718.304 applies to his claim. If, as in this case, the irrebuttable presumption does not apply, a miner shall be considered totally disabled if in absence of contrary probative evidence, the evidence meets one of the Section 718.204(b)(2) standards for total disability. The regulation at Section 718.204(b)(2) provides the following criteria to be applied in determining total disability: 1) pulmonary function studies; 2) arterial blood gas tests; 3) a cor pulmonale diagnosis; and/or, 4) a well-reasoned and well-documented medical opinion concluding total disability. Under this section, I must first evaluate the evidence under each sub-section and then weigh all of the probative evidence together, both like and unlike evidence, to determine whether claimant has established total respiratory disability by a preponderance of the evidence. *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195, 1-198 (1987).

A. Pulmonary Function Tests

Under Section 718.204(b)(2)(i) total disability may be established with qualifying pulmonary function tests.[12] To be qualifying, the FEV_1 as well as the MVV or FVC values must equal or fall below the applicable table values. *Tischler v. Director, OWCP*, 6 B.L.R. 1-1086 (1984). I must determine the reliability of a study based upon its conformity to the applicable quality standards, *Robinette v. Director, OWCP*, 9 B.L.R. 1- 154 (1986), and must consider medical opinions of record regarding reliability of a particular study. *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986). In assessing the reliability of a study, I may accord greater weight to the opinion of a physician who reviewed the tracings. *Street v. Consolidation Coal Co.*, 7 B.L.R. 1-65 (1984). Because tracings are used to determine the reliability of a ventilatory study, a study which is not accompanied by three tracings may be discredited. *Estes v. Director, OWCP*, 7 B.L.R. 1-414 (1984). If a study is accompanied by three tracings, then I may presume that the study conforms unless the party challenging conformance submits a medical opinion in support thereof. *Inman v. Peabody Coal Co.*, 6 B.L.R. 1-1249 (1984). Also, little or no weight may be accorded to a ventilatory study where the miner exhibited poor cooperation or comprehension. *See, e.g., Houchin v. Old Ben Coal Co.*, 6 B.L.R. 1-1141 (1984).

In the pulmonary function tests of record, there is a small discrepancy in the height attributed to Claimant. The fact-finder must resolve conflicting heights of the miner recorded on the ventilatory study reports in the claim. *Protopappas v. Director, OWCP*, 6 B.L.R. 1- 221 (1983). *See also Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109 (4th Cir. 1995). In analyzing the pulmonary function test results, I shall utilize the average height reported for Claimant, seventy inches.

The pulmonary function tests of record all conform to the applicable quality standards. However, the tests produced non-qualifying values. Accordingly, I find per Section 178.204 (b)(2)(i), Claimant has failed to establish total disability.

[12]A qualifying pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A non-qualifying test produces results that exceed the table values.

B. Blood Gas Studies

Under Section 718.204(b)(2)(ii) total disability may be established with qualifying arterial blood gas studies. All blood gas study evidence of record must be weighed. *Sturnick v. Consolidation Coal Co.*, 2 B.L.R. 1-972 (1980). This includes testing conducted before and after exercise. *Coen v. Director, OWCP*, 7 B.L.R. 1-30 (1984). In order to render a blood gas study unreliable, the party must submit a medical opinion that a condition suffered by the miner or circumstances surrounding the testing affected the results of the study and, therefore, rendered it unreliable. *Vivian v. Director, OWCP*, 7 B.L.R. 1-360 (1984) (miner suffered from several blood diseases); *Cardwell v. Circle B Coal Co.*, 6 B.L.R. 1-788 (1984) (miner was intoxicated).

There are only two arterial blood gas studies of record following regulation requirements. The study performed by Dr. Baker produced non-qualifying. However, Dr. Simpao's study was qualifying. *See* 20 C.F.R. 718.105(c)(2). Although Employer's physicians offer opinions to contradict Dr. Simpao's reading, Dr. Simpao, Board-certified in Internal Medicine and Pulmonary Diseases, provided a supplemental report on July 12, 2005, stating he maintains that the study is valid and abnormal.[13] Claimant has the burden of proof and must prove by a preponderance of the evidence total disability. Since there are only two conforming studies, one qualifying and one non-qualifying, Claimant has not met his burden. Therefore, the preponderance of the arterial blood gas study evidence does not support a finding of total disability. Accordingly, I find Claimant has not proven total disability under Section 718.204(b)(2)(ii).

C. Cor Pulmonale

There is no medical evidence of cor pulmonale in the record, I find Claimant failed to establish total disability with medical evidence of cor pulmonale under the provisions of Section 718.204(b)(2)(iii).

D. Medical Opinions

The final way to establish a totally disabling respiratory or pulmonary impairment under Section 718.204(b)(2) is with a reasoned medical opinion. The opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. *Id*. A claimant must demonstrate that his respiratory or pulmonary condition prevents him from engaging in his "usual" coal mine employment or comparable and gainful employment.
20 C.F.R. § 718.204(b)(2)(iv).

The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. In assessing total disability under Section 718.204(b)(2)(iv), the administrative law judge, as the fact-finder, is required to compare the exertional requirements of

[13] At the hearing Employer argued that the regulations do not allow the Director to supplement their medical examination after the initial examination and contended Dr. Simpao's supplemental report should be excluded from the record. I disagree with the Employer and find good cause to admit Dr. Simpao's supplemental report. I have taken into consideration the physician opinions of record regarding the affect of Claimant's obesity on the arterial blood gas studies and will discuss them below.

the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. *Budash v. Bethlehem Mines Corp.*, 9 B.L.R. 1-48, 1-51 (holding medical report need only describe either severity of impairment or physical effects imposed by claimant's respiratory impairment sufficiently for administrative law judge to infer that claimant is totally disabled). Once it is demonstrated that the miner is unable to perform his or her usual coal mine work, a *prima facie* finding of total disability is made and the party opposing entitlement bears the burden of going forth with evidence to demonstrate that the miner is able to perform comparable and gainful work pursuant to Section 718.204(c)(2). *Taylor v. Evans & Gambrel Co.*, 12 B.L.R. 1-83 (1988).

The physicians' reports are set forth above. In summary, Dr. Simpao performed an employment history upon Claimant finding he worked as a carrier operator in the underground mines for twenty-one years. (DX 10). Dr. Simpao opined Claimant has a moderate pulmonary impairment which prevents him from having the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Dr. Simpao supplied objective clinical findings to support his conclusion. He based his opinion on Claimant's chest x-ray, arterial blood gas study, symptomatology and other physical findings in his report. The arterial blood gas study performed by Dr. Simpao was qualifying for total disability. In his supplemental report Dr. Simpao maintains that the arterial blood gas study is valid and abnormal. He states that Claimant's weight may be a factor but does not contradict his finding on disability in the report. Therefore, Dr. Simpao's diagnosis regarding total disability is well-reasoned and well-documented.

A medical opinion does not have to be wholly reliable or wholly unreliable; rather, the opinion can be divided into the relevant issues of entitlement to determine whether it is reasoned and documented with regard to any particular issue. *See Drummond Coal Co. v. Freeman*, 17 F.3d 361 (11th Cir. 1994); *Billings v. Harlan #4 Coal Co.*, B.R.B. No. 94-3721 B.L.A. (June 19, 1997) (*en banc) (*unpub.). Accordingly, I divide Dr. Simpao's opinions into the relevant issues of pneumoconiosis and total disability. (DX 10). As noted above with respect to pneumoconiosis, Dr. Simpao's report is not well-reasoned or well-documented. However, in examining the second issue of total disability, Dr. Simpao's opinion is supported by objective medical data and testing. Moreover, it is consistent with other evidence of record.

In contrast, Dr. Rosenberg opines Claimant does not have an impairment caused by coal dust exposure. (EX 3-4, 12). He states there is no evidence of a disabling respiratory impairment. He bases his opinion on his own examination and the other medical evidence in the record. He states Claimant's total lung capacity is normal as indicated by the pulmonary function test. Dr. Rosenberg took into consideration the findings of other physicians on examination testing. Although Dr. Rosenberg's opinion is not consistent with the probative arterial blood gas studies of record, he acknowledges and explains this discrepancy. Dr. Rosenberg states that the etiology of Claimant's hypoventilation (increased CO_2) is explained by the pain medications (codeine and Tylenol III) which Claimant takes for his back pain and sleep apnea. (EX 3). Dr. Rosenberg further explained his findings and opinions in his deposition dated December 12, 2003 and supplemental opinion dated September 19, 2005. (EX 4, 12). I find Dr. Rosenberg's medical report is well-reasoned and well-documented regarding total disability.

Dr. Repsher also opines Claimant does not suffer from a respiratory impairment. Dr. Repsher acknowledges Claimant may be disabled due to his back injury but opines from a

pulmonary perspective Claimant could perform his previous coal mine employment or other similarly arduous types of labor. (DX 1). Dr. Repsher bases his opinion on his own examination and the results of the objective medical testing. Dr. Repsher stated Claimant's pulmonary function tests revealed values and data which demonstrate normal functions and diffusing capacity, and revealed no obstructions or restrictions. Dr. Repsher agreed that Dr. Simpao's arterial blood gas studies were abnormal and valid but opined the studies are abnormal in that they show both chronic and acute CO_2 retention, which is consistent with obesity hypoventilation and an element of voluntary breath withholding. He stated Claimant's abnormal arterial blood gas studies are the result of microateletasis from a combination of obesity and decreased respiratory drive. Dr. Repsher notes Claimant's obesity is contributing to Claimant's hypoxemia. Dr. Repsher took into consideration the findings of other physicians on examination and testing. Dr. Repsher further explained his findings and opinions in his deposition dated July 8, 2004 and supplemental opinion dated September 20, 2005. I find Dr. Repsher's medical report is well-reasoned and well-documented regarding total disability.

The record contains three well-reasoned and well-documented opinions regarding total disability. All three physicians are Board-certified in Internal Medicine and Pulmonary Diseases. A claimant must prove by a preponderance of the evidence total disability. Since there are two opinions finding Claimant is not totally disabled and only one opinion finding total disability, Claimant has not met his burden of proof. Therefore, based on the preponderance of the evidence I find Claimant has not established total disability by the probative medical opinion reports of record under the provisions of Subsection 718.204(b)(2)(iv).

E. Overall Total Disability Finding

Upon consideration of all of the evidence of record, Claimant has not established, by a preponderance of the evidence, total disability. Accordingly, I find Claimant has not established total disability under the provisions of Section 718.204(b).

Total Disability Due to Pneumoconiosis

Since I have found Claimant failed to prove total disability, the issue of whether total disability is due to pneumoconiosis is moot.[14]

ENTITLEMENT

Based on the findings in this case, Claimant has not met the conditions of entitlement. Claimant has not established the presence of pneumoconiosis, that such pneumoconiosis arose out of coal mine employment or that he is totally disabled. Therefore, Mr. Causey's claim for benefits under the Act shall be denied.

[14] Even if Claimant had proven total disability the probative medical evidence suggests Claimant does not suffer from total disability due to pneumoconiosis but Claimant's obesity is the reason for Claimant's problems.

Attorney's Fees

The award of attorney's fees, under this Act, is permitted only in cases in which the claimant is found to be entitled to the receipt of benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the claimant for the representation services rendered to him in pursuit of the claim

ORDER

It is ordered that the claim of Danny A. Causey for benefits under the Black Lung Benefits Act is hereby DENIED.

A

JOSEPH E. KANE
Administrative Law Judge

Notice of Appeal Rights: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with Board within thirty (30) days from the date of which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* C.F.R §802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send copy of the appeal letter to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).